No. 837

In the Supreme Court of the United States

OCTOBER TERM, 1960

HERRIN TRANSPORTATION COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

MOTION TO AFFIRM

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from that portion of the decision (J.S. 27; 186 F. Supp. 777) of a three-judge district court, convened pursuant to 28 U.S.C. 2284 and 2325, which sustained orders of the Interstate Commerce Commission (Commission) awarding motor carrier certificates of public convenience and necessity to Strickland Transportation Co., Inc. (Strickland),

and Southern-Plaza Express, Inc. (Southern-Plaza) for certain regular-route general-commodity operations between Houston, Texas, and New Orleans, Louisiana, (J.S. 53–91; 77 M.C.C. 655). Not involved in the appeal is that portion of the judgment of the district court which set aside, and remanded to the Commission for appropriate action, the Commission's authorization for Strickland and Southern-Plaza to perform service at intermediate points on such regular route located between Houston and the Texas-Louisiana state line (J.S. 53–56; 186 F. Supp. at 792–794).

After hearings held on the Strickland and Southern-Plaza applications, at which the appellant Herrin Transportation Company (Herrin) appeared as one of the protestants, the hearing examiner on October 16, 1957, issued a report recommending denial of both applications. Strickland and Southern-Plaza filed exceptions, to which the appellant, among other protestants, replied. The case was sent to Division 1 for action, but as explained below that Division did not act on the applications, and the case went before the full Commission for disposition.

The entire Commission issued its report on October 14, 1958 (J.S. 63–91; 77 M.C.C. 655), differing from the recommendations of the hearing examiner (J.S. 64; 77 M.C.C. 655), and authorizing the issuance to Strickland and Southern-Plaza of certificates, including certain restrictions not here pertinent (J.S. 88–89; 77 M.C.C. at 669–670).

Appellant Herrin, and other protestant motor carriers, filed on January 5, 1959, a petition for reconsideration of the report and order of October 14, 1958.

to which Strickland and Southern-Plaza filed replies. By order of April 10, 1959, the entire Commission denied the petition "for the reason that the findings of the Commission are in accordance with the evidence and the applicable law."

On May 1, 1959, two of the motor carrier protestants, T.S.C. Motor Freight Lines, Inc., and appellant Herrin, filed suit in the court below to review the action of the Commission, attacking not only the merits of the Commission's grants to Strickland and Southern-Plaza, but also attacking certain aspects of the Commission's procedure in handling the proceedings before it. On August 1, 1960, the three-judge district court filed its opinion in the proceeding (J.S. 27–58, 186 F. Supp. 777–795). The court affirmed the Commission in part (including all of the issues raised on this appeal), and in part set aside the Commission order and remanded that part of the case to the Commission for further consistent proceedings (J.S. 58). A formal "judgment" repeating the last two ordering paragraphs of the opinion was subsequently entered on November 28, 1960. Notice of the present appeal was filed on January 20, 1961.

If the Court should otherwise be inclined to note jurisdiction, a question as to the timeliness of this appeal should be noticed. The clerk of the district court noted the filing of the court's opinion in the public docket of the case on August 1, 1960, the same date the opinion was filed. Upon being asked by Commission counsel on September 15, 1960, as to the nature of his journal entry, the clerk replied by letter to all counsel, dated September 20, that "it is the

practice in this District for a final judgment to be entered pursuant to the Court's Opinion, and the time in which appeal may be effected begins the date the judgment is filed with the clerk". The "judgment" of November 28, 1960 (which states that the court "does hereby render judgment as follows" and then merely quotes the final two paragraphs of the August 1, 1960 opinion) was entered in accordance with this directive, but government counsel protected their right to argue that the time for appeal ran from August 1, 1960, by approving the judgment as to form only.

Under these circumstances, there is some question whether the filing and entry of the August 1, 1960, opinion, which in terms finally disposed of the case, did not start the running of the statutory appeal time of sixty days (28 U.S.C. 2101(b)), despite the court's subsequent entry of a formal "judgment" restating the last two paragraphs of the August 1, 1960 decision. See *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227, 232; *United States* v. *Hark*, 320 U.S. 531, 534; *Erstling* v. *Southern Bell Tel. & Tel. Co.*, 255 F. 2d 93, 95 (C.A. 5); *Carnes* v. *United States*, 279 F. 2d 378, 379 (C.A. 10). It seems clear that a separate document labeled "judgment" is not required where a court clearly disposes of all facets of a case in a decision or opinion. *United States* v. *Schaefer Brewing Co., supra; Beacon Federal Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 266 F. 2d 246 (C.A. 7), certiorari denied, 361 U.S. 823. However, both *Schaefer* (356 U.S. at 235) and *Hark* (320 U.S. at 534–535) appear to recognize that, while a district

court cannot extend the period for appeal by entering a second judgment, the subsequent filing of a formal document of record does indicate prima facie that the decisional statement in the earlier opinion, or docket entry thereof, was not intended to be the final action of the court. While in most cases where the later formal judgment has been adopted as controlling, there has been some extrinsic evidence of this intent in the original decision or opinion (or in the court's statements at the time of issuance), it may be that the district court here believed this to be unnecessary in the light of the practice in the district to which the clerk referred in his letter of September 20, 1960.

ARGUMENT

The procedural points raised by the appellant were all properly rejected below and are so unsubstantial as not to need further argument in this Court.

1. The appellant contends, first, that the Commission's report and order are invalid because (a) the referral of the case by Division 1 to the entire Commission was unauthorized under the Interstate Commerce Act and the Commission's rules, and (b) the action of the Division was not recorded in a formal vote "entered of record." There is plainly no substance in these contentions.

(*a*) Pursuant to Section 17(2) of the Interstate Commerce Act, 49 U.S.C. 17(2), the Commission has published rules assigning most of its functions to four Divisions of three Commissioners, subject (during the time relevant to this case) to the right of parties to file petitions for reconsideration of Division deci-

sions by the entire Commission. The determination of applications under Section 207, such as were involved in the present case, was delegated to Division 1 (23 F.R. 1748). The Commission's rules further provide (23 F.R. 1747; J.S. 103) that:

> Each division with regard to any case or matter assigned to it, or any question brought to it under this delegation of duty and authority, may call upon the whole Commission for advice and counsel, or for consideration of any case or question by an additional Commissioner or Commissioners assigned thereto; and the Commission may recall and bring before it as such any case, matter or question so allotted or assigned and may either dispose of such case, matter, or question itself, or may assign or refer the matter to the same or another division.

In this case, following the hearing, the issuance of the hearing examiner's report, and the filing of exceptions, attorneys in the Bureau of Operating Rights prepared for Division 1 and submitted to it a draft of a proposed report and order disposing of the applications. At this point, the clearance clerk for Division 1 directed the following memorandum, dated July 23, 1958, to the director of the Bureau of Operating Rights (J.S. 7):

> MEMORANDUM TO DIRECTOR COYLE
>
> Division 1, COMMRS. MURPHY, WALRATH & GOFF, has today voted to certify the report circulated June 3, 1958 to the entire Commission for consideration and decision; COMMR. WALRATH voting to return the report for revision to grant both applications.

Thereafter, as set forth in the Statement, *supra*, the entire Commission decided the case.

As the court below correctly held (J.S. 33), "The certification of the cases to the Commission by Division 1 complies in all substantial respects with the Commission's organizational rules." The Divisional certification can be construed as a request for the "advice and counsel" of the full Commission or for consideration of the case by "additional Commissioners." Moreover, when the entire Commission accepted the certification and decided the case, its action amounted to a recall of the matter from the Division. That the recall was initiated by the Division, rather than by other members of the Commission, is beside the point, for, as already indicated, the rule expressly contemplates that either the Division or the full Commission may act to enlarge the number of Commissioners deciding any particular case or matter.

(*b*) Section 17(3) of the Interstate Commerce Act provides that "Every vote and official act of the Commission, or of any division, individual Commissioner, or board, shall be entered of record, and such record shall be made public upon the request of any party interested." In compliance with this provision, the Commission's Secretary preserves the text of the motions or statements embodying the Commission's (or a Division's) decision of particular cases, the adoption of substantive or procedural rules, and other matters affecting the rights and interests of private parties, together with the votes of the Commissioners. Such a record is not placed in the public docket of the proceeding but is made public upon the request of a

party. We believe that memoranda embodying the determination of a Division to certify a case to the entire Commission should be regarded as purely internal matters, not affecting the rights of parties, which are not governed by Section 17(3). Since the only "vote" or "official act" of the Commission affecting appellant's rights was with respect to the final determination by the Commission as a whole, and that item was recorded and made public, there was full compliance with Section 17(3). But, in any event, a memorandum was made of the Division 1 action here and the Commission, upon request, furnished appellant with a copy of the memorandum.

Moreover, as the court below stated (J.S. 34), "It is difficult to see how the [appellant] could have been prejudiced by the failure to record the action of Division 1 since it resulted in a consideration by the entire Commission." Clearly, appellant had no right under the Act to have its case decided by the Division rather than by the entire Commission. Nor was it deprived of a right to object to the overruling of the examiner's proposed report since it both had and availed itself of an opportunity to seek reconsideration of the report by the full Commission (J.S. 35). Under these circumstances, the court below was plainly correct in holding that appellant was not injured or prejudiced by the Commission's action (*ibid.*). See Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)); *Sullivan* v. *United States*, 348 U.S. 170, 173; *ABC Freight Forwarding Corp.* v. *United States*, 169 F. Supp. 403, 406 (S.D.N.Y.).

2. Appellant also contends erroneously that the Commission's report and order of October 14, 1958, are invalid because they were adopted by the Commission through a system of notation voting, rather than at a conference with the Commissioners physically present.

Such voting by notation at constructive sessions of the Commission is now defined and governed by a minute adopted by the Commission in 1953. Briefly,[1] it provides that the proposed report or other document under consideration will be circulated among the Commission members who may either record their votes on the document or in separate memoranda. Any Commissioner desiring to explain his vote may do so and his explanation must be distributed to the other members. Commissioners may consult each other informally in the process of voting and any single Commissioner has the right to require that the matter be considered at a face-to-face conference of the full Commission.

The appellant contends that such notation voting violates the provision of Section 17(3) of the Interstate Commerce Act that "A majority of the Commission, of a division, or of a board shall constitute a quorum for the transaction of business." But this portion of Section 17(3) does not purport to require that Commission action be taken only in a formal meeting. Rather, the first sentence of Section 17(3) specifically authorizes the Commission to "conduct its proceedings under any provision of law in such manner as

[1] The full minute entry (with irrelevant deletions) is set out in the opinion of the district court (J.S. 35, n. 18).

will best conduce to the proper dispatch of business and to the ends of justice." This latter language has been construed by this Court as conferring upon the Commission "broad discretion" as to procedural matters—including matters relating to the process of decision (*Federal Communications Commission* v. *WJR*, 337 U.S. 265, 278, 282–283)—and as a "broad enabling statute" (*American Trucking Assns.* v. *Frisco Transportation Co.*, 358 U.S. 133, 145). We submit that the court below correctly found that "in view of the broad grant to the Commission of authority to control its proceedings, it may select this type of voting procedure as an aid in dealing with its tremendous workload" (J.S. 37).

While the bulk of state court decisions cited by appellant seem to deny that agency or municipal action can be valid except where taken in the course of a formal corporate meeting, many of these state decisions rest upon an assumed lack of notice to the members of a tribunal, an element which is not present in the Commission's notation voting procedure.[2] In any

[2] For a recent view of the highest court of a State upon notation voting, see *Erkman* v. *Civil Service Commission*, 114 Utah 228, 236, 198 P. 2d 238, 242–243, in which the Supreme Court of Utah made the following statement:

"Nor is it material that the defendant commission did not meet in formal session to adopt the findings of fact. To require such a formality would bind the commission to considerably greater formal exactitude than binds the highest, and assumedly the most formal tribunal of this state. The members of this court do not meet in formal session to approve proposed opinions. There is no apparent reason to impose upon the commission the burden of acting on a more formal manner. It is sufficient if a majority of the commission signs the findings."

event, so far as we have been able to determine, the federal courts have never held that a federal tribunal, judicial or administrative, cannot take valid action through written or notation voting procedures which preserve to each member of the tribunal the right to invoke an oral and collective conference on the matter. Where, as in the case of the Interstate Commerce Commission, huge case loads are involved, the agency must, in the absence of specific statutory provision to the contrary, be accorded large discretion as to the manner in which it musters its collective judgment.

As the court below noted (J.S. 36, n. 19), the Congress and the bar have been notified repeatedly of the notation voting procedures of the Commission. Thus, those procedures were described in the 1941 monograph on the Interstate Commerce Commission which was issued by the Attorney General's Committee on Administrative Procedure (Part 11, p. 36, of Senate Doc. No. 10, 77th Cong., 1st Sess.). They were described again in the 1944 *Report on Practices and Procedures of Governmental Control* (House Doc. No. 678, 78th Cong., 2d Sess., p. 194) transmitted to the House of Representatives by the Board of Investigation and Research created by Section 301 of Title III, Part I, of the Transportation Act of 1940, 54 Stat. 952. And, in 1951, the Commission's notation voting procedures were again described in Davis, *Administrative Law*, p. 352. Congressional concern with the case load problems of the Commission is reflected in the unique delegation provisions of Section 17 of the Interstate Commerce Act (49 U.S.C. 17). It is also reflected in the fact that, with 20

years' knowledge of the Commission's notation voting procedures, Congress has not made any effort to supersede those procedures.

Appellant attacks the legality of notation voting upon the further ground that the Commission failed to publish a description of it in the Federal Register, as allegedly required by Section 3(a) of the Administrative Procedure Act (5 U.S.C. 1002(a)) (J.S. 16). But Section 3(a) expressly excepts from its requirements "any matter relating solely to the internal management of an agency," and further provides that "No person shall in any maner be required to resort to organization or procedure not so published." Since notation voting is not a procedure which parties to Commission proceedings must "resort to" in presenting their case to the Commission, the court below correctly held (J.S. 38–39) that it is not designed for the guidance of the public, is "solely a matter of internal procedure within the Commission," and is therefore not invalid because it was not published in the Federal Register.

3. Equally without substance is the contention that the Commission's report and order are invalid because the Commission was assisted in the process of final decision by staff attorneys—not appointed as hearing examiners pursuant to Section 11 of the Administrative Procedure Act—who prepared a draft of a final report which was not served upon the parties with an opportunity to file exceptions (within the meaning of Section 8(b) of the Administrative Procedure Act) (J.S. 16–20).

In this case (as in others) the Commission was assisted in its final decisional process by staff attorneys who drafted and reviewed a proposed final report which was submitted to the Commission for its consideration. In most cases, as in this one, these attorneys are not hearing examiners appointed under Section 11. The draft reports are not served upon the parties or otherwise made public. In such circumstances, the law is settled that agency heads may utilize staff assistance of this kind. *Morgan* v. *United States,* 298 U.S. 468, 481; *United States* v. *Morgan,* 313 U.S. 409, 422; *Norris & Hirshberg* v. *Securities and Exchange Commission,* 163 F. 2d 689 (C.A.D.C.), certiorari denied, 333 U.S. 867. The practice is not barred by the Administrative Procedure Act, since Section 5(c) of that Act excludes from participation in the decisional process only those agency employees who have engaged in investigative or prosecuting functions. Where Congress has wished to specify any particular method by which an agency can utilize staff personnel not involved in investigative or prosecutory activities, it has done so specifically. Thus, in statutes enacted subsequent to the Administrative Procedure Act, Congress has required a separate opinion and review staff to assist the Federal Communications Commission in hearing cases,[3] but has provided that personal assistants must be assigned to individual members of the National Labor Relations Board to perform these tasks.[4] In no case has Congress prohibited agency heads from obtaining such

[3] 66 Stat. 713, 47 U.S.C. 155(c).
[4] 61 Stat. 139, 29 U.S.C. 154(a).

staff assistance or required that it be obtained only from hearing examiners.

Section 8(b) of the Administrative Procedure Act provides that parties shall have an opportunity to submit "exceptions to the decisions or recommended decisions of subordinate officers." The contention that this applies to a draft of a final report prepared for the Commission by staff assistants is wholly without merit. The court below correctly held (J.S. 44–45) that the reference to "recommended decisions of subordinate officers" clearly refers to the recommended decisions of hearing examiners or of the "responsible officers" who, under the last sentence of Section 8(a), may make recommended decisions in certain classes of cases. It does not apply to assistance through legal assistants, law clerks, or staff attorneys. Any other construction would plainly destroy the usefulness of staff assistance to agency heads in the process of making decisions.[5]

[5] In its "Questions Presented," appellant also suggests that the Commission's order of April 10, 1959, denying a petition for reconsideration, was invalid because not accompanied by the detailed findings contemplated by Section 8(b) of the Administrative Procedure Act (J.S. 5). The point is not discussed by appellant, and it is without merit for the reasons stated by the court below (J.S. 39–40).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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